Supreme Court, U.S.
FILED
JUL 5 - 2005
OFFICE OF THE CLERK

No. 05-54

IN THE

Supreme Court of the United States

JON RILEY HAYS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

GREY CHATHAM
CHATHAM AND BABKA
4010 N. Illinois St.
Swansea, IL 62226
(618) 233-2200

LAURA K. GRANDY
Counsel of Record
MATHIS, MARIFIAN, RICHTER & GRANDY, LTD.
23 Public Square, Suite 300
Belleville, IL 62220
(618) 234-9800

Counsel for Petitioner

195162

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED FOR REVIEW

I.

Whether the element "affects interstate or foreign commerce" in 18 U.S.C. § 1365 requires that the accused's conduct affect interstate commerce either at the time of the alleged tampering or afterwards, but not before.

II.

Whether the plea of guilty and resulting conviction of Petitioner Jon Riley Hays were the result of ineffective assistance of counsel, more specifically:

A) The plea was not "intelligent" because counsel induced the accused to plead guilty to a non-existent crime; and/or

B) The plea was not "voluntary" because counsel induced the accused to plead guilty by threats and/or misrepresentation.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF CITED AUTHORITIES iv

TABLE OF APPENDICES v

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 1

STATUTES INVOLVED 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE PETITION 7

I. A CONFLICT EXISTS IN THE CIRCUIT COURTS OF APPEAL IN THE CONSTRUCTION OF 18 U.S.C. § 1365(a) AS TO WHETHER THE "AFFECTS INTERSTATE COMMERCE" ELEMENT OF THE CRIME REQUIRES PROOF THAT THE CONDUCT OF THE ACCUSED HAS HAD AN EFFECT ON INTERSTATE COMMERCE EITHER AT THE TIME OF THE ALLEGED TAMPERING, OR AFTER, BUT NOT BEFORE 8

Contents

Page

II. PETITIONER'S PLEA OF GUILTY AND RESULTING CONVICTION WERE THE RESULT OF INEFFECTIVE ASSISTANCE OF COUNSEL BECAUSE THE PLEA WAS NOT INTELLIGENT AND/OR WAS NOT VOLUNTARY 11

CONCLUSION 15

TABLE OF CITED AUTHORITIES

Page

CASES

Bailey v. U.S., 516 U.S. 137 (1995) 12

Bousley v. U.S., 523 U.S. 614 (1998) 12

Hays v. U.S., 397 F.3d 564 (7th Cir. 2005) .....*passim*

Massaro v. U.S., 538 U.S. 500 (2003) 14

Strickland v. Washington, 466 U.S. 668 (1984) ... 13, 14

U.S. v. Frye, 738 F.2d 196 (7th Cir. 1984) 13

U.S. v. Levine, 41 F.3d 607 (10th Cir. 1994) .....*passim*

STATUTES

18 U.S.C. § 924 (Supp. 2002). 9

18 U.S.C. § 1365 (Supp. 2002) .....*passim*

21 U.S.C. § 843 (Supp. 2002) 5

28 U.S.C. § 1254 (Supp. 2002) 1

28. U.S.C. § 1331 (Supp. 2002) 4

28 U.S.C. § 2255 (Supp. 2002) .....*passim*

TABLE OF APPENDICES

Page

Appendix A — Opinion Of The United States Court Of Appeals For The Seventh Circuit Decided February 10, 2005 ..... 1a

Appendix B — Memorandum And Order Of The United States District Court For The Southern District Of Illinois Dated June 1, 2004 ..... 12a

Appendix C — Judgment In A Civil Case Of The United States District Court For The Southern District Of Illinois Dated May 19, 2004 ..... 15a

Appendix D — Order Of The United States Court Of Appeals For The Seventh Circuit Denying Petition For Rehearing Dated April 6, 2005 .... 17a

Appendix E — Excerpts From Transcript Of Proceedings Dated July 27, 2001 ..... 19a

Appendix F — Excerpts From Transcript Of Proceedings Dated May 17, 2002 ..... 23a

Appendix G — Excerpts From Government's Response To Petitioner's Amended Motion To Vacate, Set Aside Or Correct Sentence Of The United States District Court For The Southern District Of Illinois Dated March 7, 2004 ..... 26a

Appendix H — Petition Under 28 U.S.C. § 2255 To Vacate, Set Aside, Or Correct Sentence By A Person In Federal Custody Filed May 19, 2003 ... 29a

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit, affirming the denial of the Petitioner's Motion under 28 U.S.C. § 2255 (Supp. 2002), is reported at *Hays v. United States*, 397 F.3d 564 (7th Cir. 2005) February 10, 2005) (No. 04-2456), and is reproduced in Appendix A at pp. 1a-11a. Rehearing and rehearing en banc was denied by the Seventh Circuit on April 6, 2005, and is reproduced in Appendix D at pp. 17a-18a.

The opinion of the United States District Court for the Southern District of Illinois, denying the Petitioner's § 2255 Motion in *Hays v. United States*, Docket No. 03-CV-00310-DRH, was filed on May 19, 2004 and is not reported. This opinion is reproduced in Appendix C at pp. 15a-16a. The District Court granted the Petitioner's motion for Certificate of Appealability on June 1, 2004 and is not reported. This Order is reproduced in Appendix B at pp. 12a-14a.

JURISDICTION OF THIS COURT

The Seventh Circuit entered final judgment on April 6, 2005, when the Court denied the Petition For Rehearing. This Court has jurisdiction to review the final judgment from a Court of Appeals pursuant to 28 U.S.C. § 1254 (Supp. 2002). This petition for certiorari is filed within ninety (90) days of entry of the final order for which review is sought, as required by Supreme Court Rule 13.

STATUTES INVOLVED

18 U.S.C. § 1365(a) provides:

Tampering With Consumer Products.

Whoever, with reckless disregard for the risk that another person will be placed in danger of death or bodily injury and under circumstances manifesting extreme indifference to such risk, tampers with any consumer product that affects interstate or foreign commerce, or the labeling of, or container for, any such product, or attempts to do so, shall [be fined or imprisoned].

28 U.S.C. § 2255 provides:

Federal Custody, Remedies On Motion Attacking Sentence.

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

STATEMENT OF THE CASE

This case presents the issue of whether the Tenth Circuit Court of Appeals or the Seventh Circuit Court of Appeals is correct in construing the "affects interstate or foreign commerce" element of 18 U.S.C. § 1365. The Tenth Circuit requires proof that the conduct of the accused has had an effect on interstate commerce either at the time of the alleged tampering, or after, but not before. *See United States v. Levine*, 41 F.3d. 607 (10th Cir. 1994). Conversely in the case at bar, the Seventh Circuit in construing the "affects interstate or foreign commerce" element, holds that such proof of present or future effect is not required. In addition, the Seventh Circuit holds that proof of an effect on interstate commerce before the alleged tampering can satisfy § 1365. *See Hays v. U.S.*, 397 F.3d at 564.

The determination of the first question presented, i.e., whether the Tenth or Seventh Circuit is correct, provides an answer to half of the second question presented in this Petition. If the Tenth Circuit's construction of § 1365 is correct, then Petitioner John Riley Hays ("Hays") was deprived of effective assistance of counsel because counsel induced Hays to plead to an alleged violation of § 1365 when Hays' conduct did not violate § 1365. Therefore, Hays' plea was not "intelligent."

The other half of the second question presented is whether Hays was deprived of effective assistance of counsel because counsel induced Hays to plead guilty by threats and/or misrepresentation to crimes of which he was actually innocent and therefore Hays' plea was not "voluntary."

The relief requested is that Hays' conviction on both counts be vacated, his guilty plea be withdrawn, and he be allowed a trial.

The facts material to consideration of the questions presented are found in the original § 2255 Motion, filed *pro se* by Hays from the federal prison at Marion, Illinois on May 19, 2003 (excerpts reproduced in Appendix H at pp. 29a-34a); the Change of Plea Transcript dated July 27, 2001 (excerpts reproduced in Appendix E at pp. 19a-22a), and the Sentencing Transcript dated May 17, 2002 (excerpts reproduced in Appendix F at pp. 23a-25a). Hays' original § 2255 motion was filed under oath. The District Court denied his motions for discovery and an evidentiary hearing. The District Court had jurisdiction under 28 U.S.C. § 1331 (Supp. 2002) to hear Hays' § 2255 Motion, because the underlying convictions involved violations of federal law. The Government never filed any affidavits or testimony to rebut the facts as sworn under oath by Hays. The facts as stated in this Petition are undisputed and uncontradicted in the evidence.

Dr. Hays was a medical doctor practicing in Southern Illinois. In early 2000, he injured his back in a car accident. Hays took Oxycontin for pain. He subsequently became involuntarily addicted to the drug (Appendix H, p. 31a). As a result, Hays began to prescribe Oxycontin to patients who did not need the drug so that he could steal it from those patients for his own use.

Dr. Hays also prescribed and administered Oxycontin to at least one woman, Grethel Ford, a cancer patient, who did have a need for the drug. The Government prosecutor told the District Court at the Change of Plea Hearing, "that

individual did have cancer, and apparently the drug was prescribed appropriately." (Appendix E, pp. 20a-21a). There was no evidence that Hays stole Oxycontin from Grethel Ford or from any other patient who had a medical need for the drug.

Dr. Hays swore in his § 2255 proceeding: "I never prescribed Oxycontin to another person to be used improperly." (Appendix H, p. 31a). The Government chose not to rebut this assertion at any time before sentencing. In fact, the Government admitted at the Sentencing Hearing: "Now, the Government does not and has not tendered any evidence that the doctor's conduct in fact caused any harm." (Appendix F, p. 25a).

Dr. Hays was arrested by the Drug Enforcement Agency ("DEA"). He hired Terry M. Green as his lawyer in early 2001 (*See generally* Appendix H). Hays originally pled not guilty to the charges. On July 27, 2001, Hays changed his plea to guilty under § 1365(a) in the United States District Court for the Southern District of Illinois (Appendix E). Thereafter, but before sentencing, Hays hired Edward L. Dowd, Jr. as an additional lawyer (Appendix H, p. 33a). On May 17, 2002, Hays was sentenced to 51 months in prison for the following offenses:

Count 1: Tampering With Consumer Products, § 1365(a); and

Count 2: Possession Of A Controlled Substance By Misrepresentation, Fraud, Forgery, Deception Or Subterfuge, 21 U.S.C. § 843 (Supp. 2002).

One year after he was sentenced, Hays filed a timely *pro se* Motion to Vacate Conviction Under § 2255, on the ground of ineffective assistance of counsel (Appendix H, pp. 29a-34a). Hays prayed in his § 2255 Motion that his conviction be vacated, his plea be withdrawn, and he be allowed a trial on both counts. Hays swore under oath that he was "actually innocent;" Hays swore that his plea was neither intelligent nor voluntary; Hays swore that his lawyer had induced his plea by threats and/or misrepresentation (Appendix H, pp. 31a-34a). Hays swore that he had had no "criminal intent" under Count 2 (Appendix H, p. 34a); although, he acknowledged (as he always had, going back to his arrest by the DEA), that he had stolen Oxycontin from his patients who had no medical need for the drug in order to satisfy his involuntary addiction (Appendix H, p. 31a).

One of the elements of § 1365(a) is that the accused tamper[1] with a consumer product so that such conduct "affects interstate or foreign commerce." 18 U.S.C. § 1365(a). Before Hays was sentenced, the only reference in the record to the "affects interstate commerce" element took place during the Change of Plea Hearing, where the District Court asked the prosecutor:

> "Where do they manufacture Oxycontin?" The prosecutor answered: "Oh, I apologize, Your

[1] The Seventh Circuit found: "Hays does not deny that he tampered with Oxycontin." *Hays*, 397 F.3d at 568. Hays, however, denied that he had tampered with the drug. See Appendix G, which is an excerpt from the Government's Response to Hays' § 2255 Motion, dated March 4, 2004: "Petitioner [Hays] claims that his conduct did not amount to tampering." Hays had also denied throughout that his conduct violated the other elements of § 1365. Specifically, he denied that he acted with a "reckless disregard" for, or an "extreme indifference" to, the safety of another.